

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 04.03.2021

CORAM

THE HONOURABLE MR. JUSTICE P.VELMURUGAN

CRL.A.No.325 of 2019 and
Crl.M.P.No.7350 of 2019

Duraisamy

... Appellant

.Vs.

State by:Inspector of Police
All Women Police Station,
at Kondalampatti
(Crime No.07 of 2014)

... Respondent

Criminal Appeal filed under Section 374 (2) of the Code of Criminal Procedure to allow this appeal by setting aside the conviction and sentence passed by the Judgment in SPL.S.C.No.1 of 2015 on the file of Mahila Court, Salem by Judgment dated 24.04.2019.

For Appellant : M/s.R.Krishnakumar
P.Thalapathi
M.Satham Hussain
(Legal Aid counsel for
Petitioner)

For Respondent : Mr.R.Suryaprakash, GA

J U D G M E N T

This Criminal Appeal has been filed against the Judgment dated 24.04.2019, made in Spl.S.C.No.1/2015, on the file of Mahila Court, Salem.

2. The respondent police registered a case against the appellant in Crime No.7 of 2014 for the offences punishable under Section 8 r/w 7 of the Prevention of Children from Sexual Offences Act 2012 (in short 'POCSO' Act). After investigation, charge sheet was laid and the same was taken on file in Spl.S.C.No.1 of 2015, by Mahila Court, Salem.

3.After completing the formalities, the learned Judge framed charges against the accused and after trial, found the appellant guilty of the offences punishable under Section 8 r/w 7 of the

POCSO Act and convicted and sentenced the appellant to undergo rigorous imprisonment for five years and to pay a fine of Rs.10,000/- in default to undergo 6 months simple imprisonment. The sentences were ordered to run concurrently. Aggrieved by the said conviction and sentence, the accused is before this Court by filing this Appeal.

4. The learned counsel for the appellant would submit that the appellant had not committed the sexual assault as alleged by the prosecution, and the theory projected by the prosecution does not attract the ingredients under Section 7 of the POCSO Act. He would further submit that there is no penetrative sexual intercourse on the victim girl and the complaint was lodged after four days from the occurrence. He would further submit the alleged occurrence is said to have taken place at 10.30 A.M., by which time the public would have gathered and there is no possibility for the appellant to commit such an offence in the public place. He would further submit that complaint was given after four days of the alleged occurrence, the said delay was not properly explained by the prosecution. He would further submit even P.W.2- victim girl has stated that when she went to fetch water from the bore well near to her home, the appellant came there and committed sexual assault on her, and when she shouted, he immediately put cloth on her mouth, however, the victim girl escaped and thereafter informed to P.W.4 and then informed to her parents through phone on the same day, but complaint was given only after four days from the date of occurrence.

5. He would further submit that P.W.4, to whom the victim girl informed the occurrence is not an eye witness, but she is only a hear-say witness. He would further submit that P.W.1- mother of the victim girl, in her cross examination has not stated the correct date of lodging the complaint and further stated that both P.W.1 and P.W.3 have attested the complaint written by her daughter P.W.2., whereas, from Ex.P1-complaint, it is clearly seen that the P.W.2 had put her thumb impression on the complaint, which clearly shows that alleged complaint is not genuine and earlier complaint given was suppressed. He would further submit that due to enmity between the appellant and the victim family, the complaint was lodged after four days from the date of alleged offence. He would further submit that the earlier complaint given was suppressed and the alleged complaint is only the development, to implicate the appellant. He would further submit that P.W.2, in her evidence had deposed that there was swelling in her chest as well as in her thighs, whereas P.W.10- the Doctor who examined the victim girl had not deposed that there was sexual assault on the victim girl and therefore the evidence of P.W.10, does not corroborate the evidence of P.W.2, which fact has not been taken note of by the

learned trial Judge. He would further submit that complaint does not corroborate the statement recorded under Section 164 Cr.P.C. and therefore, the prosecution has failed to establish the case beyond reasonable doubt. He would further submit that the learned Judge failed to consider the fact that Section 7 of the POCSO Act has not been made out. He would further submit that the prosecution has failed to establish its case with cogent evidence and therefore the Judgment of the trial Court is liable to be set aside.

6. The learned Government Advocate (Crl. side) would submit that the age of the victim girl at the time of occurrence is only 13 years and when the parents of the victim girl had gone outside, the victim girl went alone to fetch water from the bore well near the house, and at that time, the appellant went there and sexually assaulted the victim girl and when she raised an alarm, the appellant put cloth in her mouth, thereafter the victim kicked the appellant and escaped from the place of occurrence and immediately informed P.W.4. He would further submit P.W.4 clearly deposed that the victim girl came and informed her and thereafter they informed to her parents immediately. P.W.1- mother of the victim girl has clearly deposed that when they tried to approach the appellant, the appellant did not come to the house for two days and therefore, informed to the panchayatars and since the appellant did not co-operate, left with no other option, they gave a complaint to the police. He would further submit that P.W.1 and P.W.3 parents of the victim girl clearly stated that, when they had gone to their work, P.W.4 informed them about the occurrence and immediately they came there, and when they went to the house of the appellant, he was not found for two days. Subsequently, they have deposed that on the same date, the victim girl was produced before the Doctor and narrated the occurrence and the same was entered in the accident register and the case of the prosecution is that the victim girl has sustained no injuries and that there was no penetrative sexual intercourse committed by the appellant and therefore, the Doctor's evidence that there is no injury is not helpful to the defence case.

7. He would further submit that regarding the age proof, the Doctor who examined the victim girl opined that the age of the victim girl as per the medical certificate which is marked as Ex.P9 is 14 and less than 16 and hence, the victim is only minor below 18 as per the definition of Section 2 (1)(d) of the POCSO Act, the victim is a child. He would further submit that the victim child who was examined as P.W.2 clearly narrated the episode and she was produced before the Judicial Magistrate for recording statement under Section 164 (Cr.P.C.) and the victim girl informed the Magistrate that she had been subjected to sexual assault, for which, the complaint was given. It is

further contended that the prosecution has explained the reason for delay and the delay is not inordinate and has been properly explained and the prosecution has proved its case beyond reasonable doubt. Though there are contradictions in chief as well as cross examination, since the witnesses were not cross examined immediately soon after the chief examination, the contradictions are minor contradictions, which does not affect the credibility of their depositions and therefore, the trial court has come to the conclusion that the contradictions, pointed out by the defence does not materially affect the root of the prosecution case. He would further submit that a combined reading of the exhibits along with depositions would reveal that the victim girl was subjected to sexual assault which definitely falls under Section 7 of the POCSO Act and therefore, the trial Court has rightly convicted and sentenced the accused as stated supra and the same does not warrant any interference.

8. Heard both sides. Perused the records.

9. The case of the prosecution is that on 26.07.2014 at about 10.30 a.m., when the victim girl, aged about 14 years, went to the bore well near her house to fetch water, the appellant, with sexual intent, came from backside and molested her and thereby committed sexual assault on the victim girl, punishable under Section 8 of the POCSO Act.

10. After investigation, the respondent police laid the charge sheet against the appellant and the trial Court framed a charge under Section 8 r/w 7 of the POCSO Act against the appellant.

11. In order to prove the case of the prosecution before the trial Court, examined as many as 13 witnesses as P.W.1 to P.W.13 and 19 documents were marked as Exs.P1 to P19. No material object was marked.

12. After completing the examination of the prosecution witnesses, all the incriminating circumstances culled out from the evidence of the prosecution witnesses, were put before the appellant, but he denied the same as false and pleaded not guilty. On the side of the appellant, no oral or documentary evidence was produced.

13. After completing trial and hearing the arguments advanced on either side, the learned Sessions Judge, Mahila Court, Salem, by judgment dated 24.04.2019 made in Spl.S.C.No.1 of 2015, convicted and sentenced the appellant as stated above.

14. Challenging the judgment of conviction and sentence, the present appeal has been preferred by the appellant.

15. This Court, being an Appellate Court, is a fact finding Court, which has to necessarily re-appreciate the entire evidence and give an independent finding.

16. Before the trial Court, the prosecution examined the victim girl as PW.2 who is aged about 14 years at the time of occurrence and she had deposed that 26.07.2014 was a Saturday, and since the said day was a holiday for her school, at about 10.30 A.M., she alone went for fetching water from the nearby bore well. On noticing this, the appellant came there and sexually assaulted her. When she raised alarm the appellant put cloth on her mouth, but she kicked him and escaped from there. P.W.2 immediately informed to P.W.4, who, in turn, informed to her parents. Thereafter, the parents of the victim girl came there and tried to search the appellant, but they could not find him for two days and therefore they decided to file Ex.P1-complaint before the respondent police and after registering the case, the respondent police have investigated the matter.

17. A reading of the evidence of the victim child clearly shows that the victim child had clearly narrated the events that there was no person at the time of occurrence and she was alone, by which time, appellant had committed the sexual assault on her. A reading of the complaint and also the evidence of P.W.s 1 and 2 coupled with statement recorded under Section 164 Cr.P.C. by the learned Judicial Magistrate, EX.P19 and Ex.P7- Doctor's certificate given to victim girl, clearly establishes that it was the appellant who has assaulted her sexually, which falls under Section 7 of the POCSO Act and that it is to be pointed out that penetrated sexual assault is not necessary and that merely touching any private part falls under Section 7 of the POCSO Act. In this case, the victim girl has stated that the appellant squashed her breast which clearly falls under Section 7 of the POCSO Act besides P.W.2 victim child clearly stated that the appellant has committed sexual assault and had identified the appellant as the perpetrator of the crime and, therefore, no corroboration is necessary, because in cases like this the culprit will wait for the chance of loneliness of the victim child and taking advantage of the loneliness commit these types of activities and therefore there won't be any eye witness and no corroboration is necessary. Only the Court has to see the trustworthiness of the evidence of the victim. On a perusal of the evidence, this Court does not find any reason to discard the evidence of the victim child and there is no reason to doubt about the trustworthiness of the victim girl. After the occurrence the victim girl said to have

gone to P.W.4 and informed about the occurrence, even P.W.4 in her evidence also narrated the same. P.W.7- the Doctor also stated that it was informed by the victim child that a known person had committed sexual assault on her. As far as the delay is concerned, the father of the victim girl has clearly narrated that on coming to know about the occurrence, immediately they went to the appellant's house to sort out the matter and for two days the appellant had not turned up to his house and thereafter they went to panchayatars to sort out the issue without going to the police station. Since the appellant did not co-operate before the panchayatars, there was a delay in lodging the complaint. In the above backdrop, the delay, which is put in issue by the defence, cannot be said to be fatal to the prosecution case, as the same has been explained properly. Therefore, the contention of the appellant is not acceptable.

18. Though a stand is taken by the defence that there were two complaints and the earlier complaint has been suppressed, however, no material whatsoever evidencing the said first complaint has been placed before the trial court.

19. It is the contention of the appellant that though the complaint, Ex.P-1 in which the victim, P.W.2, has put her thumb impression, is said to have been attested by witnesses, which fact has been spoken to by P.W.3 in his cross examination, yet there is no attestation, which discredits his testimony and, therefore, the genesis of the complaint, Ex.P-1 is prone to be doubtful.

20. However, it is the submission of the learned Government Advocate that cross examination of P.W.3 was not done on the same date, but was done after a period of two years from the date of chief examination of the witnesses by recalling the witnesses and, therefore, contradictions of this nature are prone to occur over a period of time and such contradictions cannot be put against the prosecution. It is therefore submitted that once the victim child clearly stated that she was subjected to sexual assault, which has been established with evidence a presumption is drawn under section 29 of the Act and it is for the appellant to rebut the presumption in the manner known to law.

21. A perusal of the evidence of all the witnesses coupled with the documentary evidence clearly prove the complicity of the appellant in the commission of the offence. Further, the appellant has not rebutted the presumption raised by the prosecution relating to the act of the appellant through any evidence and in the absence of the same, the stand of the learned Government Advocate that minor contradictions cannot be put against the prosecution to discard its case, more so when

the witnesses have been examined after a long lapse of time from the date when chief examination was conducted deserves acceptance.

22. On a conjoint reading of all the evidence and the depositions, this Court is of the conclusion that the appellant has committed the offence as alleged by the prosecution. Therefore, the trial Court rightly appreciated the evidence and convicted the accused as stated supra. This court does not find any merit in the Appeal and the same is liable to be dismissed and accordingly dismissed.

23. Considering the nature of the offence committed by the appellant and since there being no penetrative sexual assault on the victim and in the absence of any injury as evident from the evidence of Doctor, this Court is of the considered view that the sentence imposed on the appellant could be modified from five years to four years which will meet ends of justice.

24. In the result, this Criminal Appeal is dismissed with the above modification in sentence. Consequently, connected M.P. is closed. The legal aid counsel appointed by this Court is entitled to legal fees as per rules.

Sd/-
Assistant Registrar(CO)

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Sub Assistant Registrar

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To

1. The Sessions Judge,
Mahila Court, Salem.

2. The Inspector of Police,
All Women Police Station,
at Kondalampatti.

3. The Public Prosecutor (Crl.side)
Madras High Court.

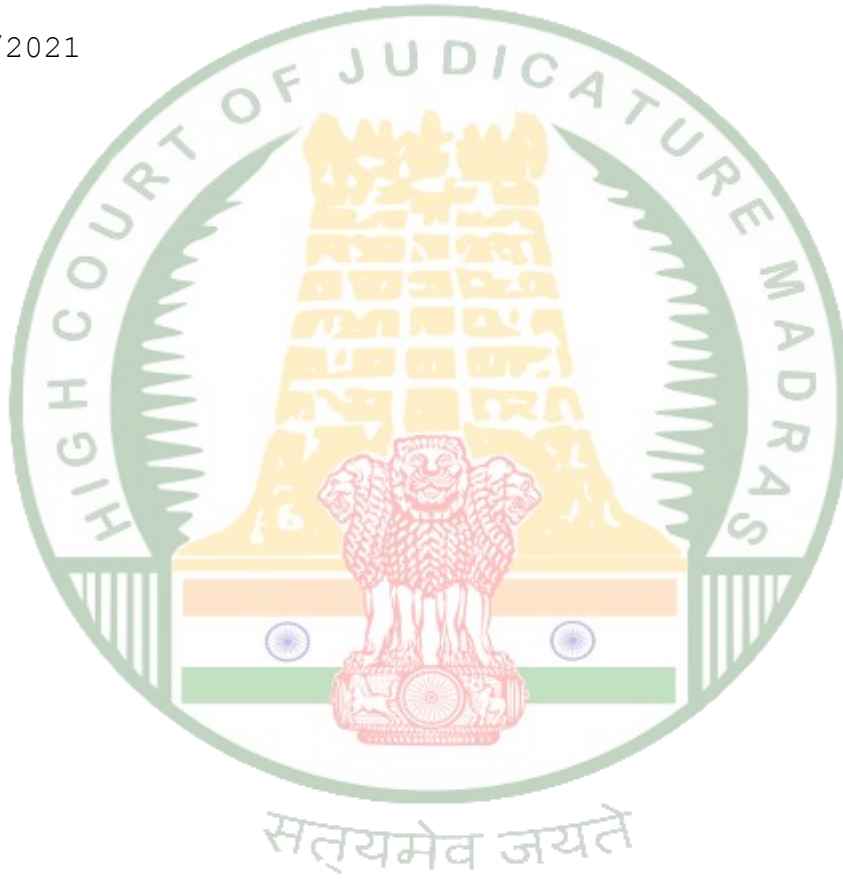
4. The Secretary,
Legal Services Authority.

Copy to

The Deputy Registrar,
(Criminal Section)
High Court, Madras.

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